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No. 71-415

In the Supreme Court of the United States

OCTOBER TERM, 1971

COLORADO RIVER WATER CONSERVATION DISTRICT,
PETITIONER

v.

ROCKY MOUNTAIN POWER COMPANY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF COLORADO

MEMORANDUM FOR THE UNITED STATES AS *AMICUS CURIAE*

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This memorandum is submitted in response to the Court's order of December 14, 1971, inviting the Solicitor General to express the views of the United States in this case.

1. The Colorado Supreme Court has rejected a claim by the Colorado River Water Conservation District, a public agency of the State of Colorado, for a conditional decree allowing a 1954 priority date for appropriation of water for a specific project. The claim to the 1954 date was based upon studies and

surveys of the Bureau of Reclamation of the Department of the Interior, which the District claimed constituted a "first step" in the development of the Flattops Project in Colorado to provide 128,000 acre-feet of water and 221,300,000 kwh of salable energy annually for potential oil shale development. Section 3 of the Colorado River Storage Project Act of 1956, 70 Stat. 105, 107, as amended, 43 U.S.C. 620b, contemplated the development of projects such as Flattops. The District, under its then customary procedures, wanted to acquire the priority date in a conditional decree so that it could be transferred to the United States without charge as had been done with respect to other projects (see, *e.g.*, Pet. App. D). The issuance of a conditional decree with a priority date based on the "first step" of the development process is authorized by Colorado law. See *Taussig* v. *Moffat Tunnel Water and Development Co.*, 106 Colo. 384, 391, 106 P.2d 363, 367; *Metropolitan Suburban Water Users Association* v. *Colorado River Water Conservation District*, 148 Colo. 173, 365 P.2d 273; *Four Counties Water Users' Association* v. *Colorado River Water Conservation District and Town of Steamboat Springs*, 414 P.2d 469 (Colo.); *Four Counties Water Users Association* v. *Colorado River Water Conservation District and Middle Park Water Conservancy District*, 414 P.2d 478 (Colo.).

The Colorado Supreme Court denied a 1954 priority date to the District for the Flattops Project on the grounds that (1) the District could not assert a priority date based on work done by the Bureau of Reclamation since the United States had asserted no claim

in the adjudication and since no privity was shown to exist between the District and the United States (Pet. App. A-5 to A-6), (2) even if the District could attribute the work done in 1954 to itself, the work done was insufficient to constitute a "first step" towards appropriation of water rights (Pet. App. A-6), and (3) in any event, the District failed to show that it had the "requisite contemporaneous intent" to appropriate water rights when the initial work was done (Pet. App. A-6 to A-7).

2. Insofar as the decision below may rest on the decision in *Four Counties Water Users Association* v. *Colorado River Water Conservation District*, 161 Colo. 416, 425 P. 2d 259, certiorari denied, 389 U. S. 1049, and its discriminatory approach to "first step" appropriation merely because initial work on a project is done by employees of the Bureau of Reclamation, we reiterate the objections expressed in our *amicus* memorandum filed with this Court on petition for certiorari in that case (No. 498, October Term, 1967). There is certainly no reason to treat employees of the Bureau differently with respect to the steps they take toward planning a reservoir project than the employees of any other large potential water user, such as a power company. Similarly, we would find unjustified any inference from the *Four Counties* case that survey and planning work by Bureau of Reclamation employees must be discounted since, under governing federal statutes, additional formal steps, such as further congressional authorizations and appropriations, must be taken to authorize a project.

In its stated rationale, the decision below would appear to foreclose reliance by the United States on these same actions if it, rather than the District, were the claimant—a result which would seriously jeopardize the development of federal projects envisioned by Congress in enacting the Colorado River Storage Project Act. Since under this Court's decisions in *United States* v. *District Court for Eagle County*, 401 U.S. 520, and *United States* v. *District Court for Water Division No. 5*, 401 U.S. 527, the United States is not immune from suit in state water adjudication proceedings, the United States now participates in Colorado water adjudications and directly asserts claims similar to the one asserted by the District here. Indeed, the United States has indicated an interest in the Flattops Project by filing a claim on its own behalf in Water Division No. 5, subject only to congressional authorization and appropriation.

We submit, moreover, that the reliance by the court below on the lack of privity between the District and the United States was unwarranted. While it is true that the government had not formally assigned any rights to the District, the District has customarily assigned to the government any rights it has been able to obtain in conditional or permanent water appropriation decrees. In refusing to permit the District to rely on work by Bureau of Reclamation employees as a "first step" in the appropriation of water, the court ignored this close working relationship between the District and the United States. Similarly, the District should not be deemed to have lacked "the

requisite contemporaneous intent" to appropriate water rights merely because those who did the initial survey and reporting work were employees of the Bureau of Reclamation, rather than employees of the District. The District, since it intended to transfer the conditional decree rights to the government, should be presumed to have the same intent as the government as a result of the Bureau employees' work. A showing that the government had the necessary "contemporaneous intent" to appropriate at the time of the initial survey work—an issue not considered by the court below—could validly be supported, we submit, *nunc pro tunc* by later acts such as the publishing of reports or congressional authorization of, and appropriation for, a project.

In sum, it is our view that, even though the underlying issues decided by the court below may henceforth recur more frequently in a different procedural context in which the government will be asserting its own claims, they are issues of considerable importance to the administration of federal water resources programs. While these issues do not differ significantly from those presented in the *Four Counties* case, *supra*, in which certiorari was denied, we adhere to the position expressed in our *amicus* memo-

randum in *Four Counties* that review by this Court is warranted.

Respectfully submitted.

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FEBRUARY 1972.